

PUBLIC PROSECUTOR

v.

MAHBUD ANDILING

HIGH COURT BORNEO, KOTA KINABALU

CHARLES NC HO J

[CRIMINAL TRIAL NO. 6 OF 1984]

26 FEBRUARY 1986

CRIMINAL LAW AND PROCEDURE: *Drugs - Trafficking - Section 39B(1)(a) of the Dangerous Drugs Act 1952 - Rebuttal of presumptions under ss. 37(d), (da) of the Act - Balance of probabilities.*

The accused was charged with the trafficking of dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act"). After hearing the prosecution, the Court was of the opinion that sufficient evidence had been adduced for the presumptions under s. 37(d) and (da) of the Act to be invoked and the accused was called upon to make his defence.

Held:

[1] Once a presumption has been raised against an accused person the burden is on him to rebut it on a balance of probabilities - see *Public Prosecutor v. Yuvaraj* [1969] 2 MLJ 89.

[2] The defence had failed to rebut on the balance of probabilities the presumptions under ss. 37(d) and (da) of the Act.

[3] The prosecution had proved its case against the accused beyond reasonable doubt and the mandatory death sentence was imposed.

[Accused sentenced to death.]

Case referred to:

Public Prosecutor v. Yuvaraj [1969] 2 MLJ 89

Legislation referred to:

Dangerous Drugs Act 1952, ss. 37(d), (da)

For the public prosecutor - Abdul Malik bin Haji Ishak; SFC

For the accused - Koh Gin Chee

JUDGMENT

Charles NC Ho J:

In this case the accused was charged as follows:

That you on 6 January 1984 at about 12.00 p.m. near a canteen at Taman Golf View, Bukit Padang, in the District of Kota Kinabalu, in the State of Sabah, did traffic in dangerous drugs, to wit, 721.27 grammes of cannabis on your own behalf and that you have thereby contravened s. 39(B)(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) Act 234, and punishable under s. 39(B)(2) of the said Act.

The accused pleaded not guilty to the charge and was defended by Counsel Mr. Koh Gin Chee. Senior Federal Counsel Abdul Malik bin Haji Ishak conducted the prosecution.

At the end of the trial on 25 February 1986 I convicted the accused on the charge preferred against him and sentenced him to death by hanging.

a Briefly the facts relied upon by the prosecution are these:

b On 6 January 1984, at about 8.20 a.m. whilst detective constable Che Roni (PW5) and detective constable Hamzah (PW6) were in town at the Economy supermarket Kota Kinabalu they received information from a source that there would be drug trafficking at Taman Golf View, Bukit Padang at about 12.00 p.m. that afternoon. They were told to expect a young Suluk man to be carrying some cannabis for sale. The source also gave a general description of the man to them. Upon receiving such information the two constables went to the police headquarters at Kepayan and passed the information to one ASP Lim Chin Tuan who was attached to the anti-drugs division at the police headquarters.

c ASP Lim (PW4) decided to lay an ambush at Taman Golf View to arrest the suspect so he conducted a briefing. He called in constable Alias (PW7) to his office and briefed him about the intended ambush. PW4 and the 3 constables then left for Taman Golf View at about 11 a.m. They arrived there at about 11.15 a.m. They were all in civilian clothes. The 3 constables were instructed by ASP Lim to take up their positions and to pretend to be construction site workers. Constable Alias took up position after the bridge at the left hand side of the road. Constables Che Roni and Hamzah were positioned on the right hand side of the road opposite the canteen and ASP Lim just in front of the canteen. Their various positions were as shown in the sketch plan prepared by PW2.

d According to Constable Alias (PW7) at about 12 p.m. he saw a man coming out from the direction of the kongsi and then along the main road. (PW7 was nearest to the kongsi from his position). When he first saw the man, the man was about 100 feet away. The man was holding a white plastic bag in his right hand and he was alone. There was no one else on the main road at that time. After the man walked past his position he followed him from behind. When he saw the man walk pass the bridge he increased his pace. When the man reached the position where constables Che Roni and Hamzah were positioned he caught hold of the man from behind in a bear-hug and at the same time called out 'Police'. The man struggled to free himself. Constable Hamzah came to PW7's assistance by catching hold of the man's left hand with both his hands. The man was still trying to free himself. PW7 then let go of his hug and instead used both his hands to hold the right hand of the man.

e The man continued to hold on to the plastic bag and PW7 noticed that the man was shivering. ASP Lim then came forward and took away the plastic bag away from the man. ASP Lim also instructed Constable Che Roni to handcuff the man from behind. PW7 noticed that the man was still shivering and looked pale. ASP Lim then opened the plastic bag in front of PW7 and the other two constables. When the plastic bag was opened PW7 saw a brown shirt wrapping a bundle which was in turn wrapped by a Chinese newspaper and tied with a pink string. Inside the newspaper wrapping there was a bundle of dried vegetable matters and a brown paper bag also containing some dried vegetable matters believed to be cannabis. PW7 identified the plastic bag (Ex. P8), the brown shirt (Ex. P9), the old Chinese newspaper (Ex. P6), the brown paper bag inside the newspaper and the dried vegetable matters as being similar to those articles which he saw after the man's arrest. He also identified the accused as being the man they arrested on 6 January 1984. He further testified that he followed the accused after accused walked past his position because accused fitted the descriptions given by the 'source'. He also said that after the examination ASP Lim wrapped and put the exhibits back in the plastic bag in their original positions. ASP Lim then searched the body of the accused and found a pass. The accused then led them to the kongsi where he stayed and they found nothing there. There was also no one in the kongsi at that time. According to him throughout the arrest accused said nothing except when ASP Lim asked him where he stayed.

f

g

h

i

The other prosecution witnesses gave substantially the same account of what happened at the scene of the arrest. They have all identified the accused and all the exhibits produced in Court. They all said that the accused was alone when he was arrested. They all denied that a man was with accused and that man ran away. ASP Lim (PW4) said that he took accused and the exhibits back to the Karamunsing police station and lodged a report with the Kota Kinabalu police station. He called for acting ASP Lim Yet Kong (PW2). When PW2 came he handed to him all the exhibits and PW2 took custody of them.

*a**b*

PW2 testified that when the exhibits were handed to him by PW4 he examined them in front of PW4 and the accused. He arranged for photographs to be taken of the exhibits. He then wrapped the exhibits by using brown papers and labelled and sealed them with the police seal with the intention of sending them to the government chemist department for analysis. He kept the exhibits in his steel cabinet under lock and key. The next day he took the exhibits together with a letter requesting for analysis to the government chemist department and handed them to one Khalid Safan. He also sent the films to police headquarters for developing. At about 11.10 a.m. he went with PW4 to Taman Golf View where he prepared a sketch plan of the scene based on information given by PW4. On 19 January 1984, he collected the exhibits from the government chemist together with a report made by the chemist. The exhibits were wrapped in the same brown papers and sealed with the seal of the chemist department. He kept the exhibits in the exhibit store until the trial. On 21 October 1985 he served a copy of the chemist report on the accused.

*c**d*

It is clear from the evidence of the government chemist, Khalid Safan (PW1) that the dried vegetable matters handed to him by PW2 were in fact cannabis. According to PW1 he found the dried vegetable matters to be cannabis by using 3 tests. Each test carried out indicated that they were cannabis. He weighed the vegetable matters and found the total weight to be 721.27 grammes. PW1 had given expert evidence in other cases and his expertise in the present case has not been challenged. I accepted him as an expert witness. The defence had also failed to seriously challenge the evidence of the police witnesses as regards the conduct or behaviour of the accused when he was being arrested. The prosecution in this case relied on the presumptions under s. 37(d) and s. 37(da) of the Dangerous Drugs Act, 1952 (Revised 1980). I was of the opinion that the prosecution had adduced sufficient evidence for the presumptions under those provisions to be invoked and so I called upon the accused to make his defence.

*e**f*

The accused gave evidence under oath. He told the Court that on 6 January 1984, he worked as a wireman in a construction site at Bukit Padang. At 12 p.m. he was working and he went back to the kongsi at about that time to store his tools. He went back to the kongsi with a friend called Aman. No one was in the kongsi but there were people eating outside the kongsi and he recognised many of them. After he stored his tools he decided to go to the canteen. He went together with a friend by the name of Abdul Salleh who had come to visit him. Abdul Salleh was carrying a white plastic bag. Abdul Salleh followed him to the canteen. Abdul Salleh asked him to carry the plastic bag and told him that it contained some clothings. Abdul Salleh did not tell him to give the plastic bag to anyone but just to put it in the canteen. He said that he carried the plastic bag for Abdul Salleh because Abdul Salleh asked him. As he walked towards the canteen he was arrested by the police and Abdul Salleh ran away. One policeman chased after Abdul Salleh but failed to catch him. When he was being arrested he told the police about his friend Abdul Salleh when the police asked him who was the person who ran away. He did not open the plastic bag to see what was inside and he thought it contained clothings. He did not throw it away as it did not belong to him and he was afraid of being scolded. After he was handcuffed he was taken back to the kongsi

*g**h**i*

- a* and police searched it and found nothing. Under cross-examination accused said that he did not struggle when he was being arrested by the police. He told police the name of the man who ran away as Abdul Salleh whilst he was in the car on the way to the kongsi. He denied that he made up Abdul Salleh. He said that at the time of arrest he knew Abdul Salleh for about 20 days. Abdul Salleh had come to the canteen where they first met. He agreed that Abdul Salleh was not a close friend. He said he carried the bag for Abdul Salleh because he was afraid of Abdul Salleh. On being questioned further he did not feel nice not to carry the bag for Abdul Salleh as he asked. Abdul Salleh handed the plastic bag to him when he (Abdul Salleh) tied his shoe lace.

- c* All the prosecution witnesses testified that accused was alone when he came out from the kongsi and walked along the main road. They also testified that no one ran away and accused struggled hard to free himself so much so that constables Alias and Hamzah had to use both their hands to hold him. The prosecution witnesses were hardly cross-examined and I had no reason to doubt the truth of their evidence. It would appear that the name Abdul Salleh was never given to counsel for the defence by the accused. Counsel in cross-examination of prosecution witnesses could only refer to a man running away and not Abdul Salleh running away. If accused had in fact told the police the name Abdul Salleh there was no reason why he did not tell his counsel about him. There was also no reason why accused should struggle to free himself if he was merely carrying the plastic bag for Abdul Salleh and believed it to be clothings. When ASP Lim examined the contents of the plastic bag in front of the accused and the others accused said nothing about the plastic bag. He could have easily told the police that the plastic bag belonged to Abdul Salleh if there was such a person. He said nothing about it. For these reasons I disbelieved the accused's story and rejected it. I was of the view that Abdul Salleh was just a figment of accused's imagination and accused must have known that the plastic bag contained cannabis.

- e* The defence also called another witness by the name of Araman bin Jawari (DW2). He testified that he was working together with the accused at Bukit Padang on 6 January 1984. He said that on that day about 12 p.m. he went back to the kongsi with the accused and he saw accused eating in the kongsi and later went out with a man whom he did not know. He said neither accused nor the man carried anything in their hands. He watched them walk all the way to the canteen and he saw nothing happening. He did not see anyone approach them. If this witness did see what he claimed to have seen he would not have failed to see the plastic bag being carried by one of the two men. He would have also seen the accused being arrested. He said he saw nothing. This witness also denied having been interviewed by the defence counsel and the Suluk interpreter only hours before he gave evidence. When he was reminded by the defence counsel about this he said he could not remember because he was having a headache and had not eaten lunch. I found this witness to be totally unreliable and disregarded his evidence.

- f* Once a presumption has been raised against an accused person the burden is on him to rebut it on a balance of probabilities. (See *Public Prosecutor v. Yuvaraj* [1969] 2 MLJ 89). For reasons given above I was of the opinion that the defence had failed to rebut on the balance of probabilities the presumption under s. 37(d) and s. 37(da) of the Act. Accordingly I found that the prosecution had proved its case against the accused beyond reasonable doubt and charge preferred against him and imposed the mandatory death sentence.

Also found at [1986] 2 CLJ 476

g

h

i